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Note for the Bills Committee on the English Schools Foundation (Amendment) Bill 2007

Proposed Objects of the English Schools Foundation

Background

At the meeting of the Bills Committee on the English Schools Foundation (Amendment) Bill 2007 held on 8 October, members requested that the advice to members at the meeting on the proposed objects of the English Schools Foundation (ESF) be put into writing. The essence of the advice is recapitulated as follows, taking into account the concern of members expressed at the meeting and with references to relevant authorities added.

Reviewability of decisions of ESF

2. In deciding whether a body is or is not amenable to judicial review the prime focus is not so much on the status and nature of the body, as the particular function being exercised by it.¹ In *R v London Beth Din (Court of the Chief Rabbi), ex p Michael Bloom* [1998] COD 131, Lightman J stated that "There have been substantial developments in this area of law over recent years. The stage presently reached is that for a decision to be judicially reviewable (so far as relevant) it must be a decision reached by a body exercising a statutory or (*de facto* or *de jure*) governmental function ...".

3. In the Hong Kong case of *R v The English Schools Foundation* (HCAL 61/2004), which concerns the judicial review of the decision of ESF to expel a student, Hartmann J stated the "The ESF is not a private foundation which manages private schools. To the contrary, the ESF is a product of statute, that statute being the English Schools Foundation Ordinance Cap. 1117 ('the Ordinance'). In terms of s.3 of the Ordinance, the ESF is established as a body corporate with perpetual succession, able to sue and be sued in its own name....The ESF therefore, and the schools which form

¹ Fordham, 'Judicial Review Handbook', 4th Edition, page 670

part of the Foundation, are public bodies fulfilling public functions ... In my judgment, in determining whether a student should be admitted to an ESF school and in determining whether a student should be expelled from an ESF school, both the ESF itself and the individual school are performing a public function not a private one."

4. Based on the above authorities, it is likely that a decision of ESF which relates to the implementation of its objects would be reviewable by the court.

Proposed objects of ESF

5. Whether an obligation which appears to be imposed by statute upon a body is a target duty is a matter of interpretation. Target duties are aspirational duties whose breach does not ordinarily lead to a remedy.² As Owen J said in *R v Bath Mental Healthcare NHS Trust, ex p Beck* (2000) 3 CCLR 52, "This, to use the phrase of Woolf LJ, as he then was, "is a target duty, failure to achieve which without more will not constitute a justiciable breach.""

6. In *R v Inner London Education Authority, ex p Ali* (1990) 2 Admin LR 822, the applicant sought relief on a continuing failure by the Inner London Education Authority in breach of their statutory duty under section 8 of the Education Act to secure the availability of sufficient schools providing primary education for all children in the Tower Hamlets area. The section provides, among other things, that "It shall be the duty of every local education authority to secure that there shall be available for their area sufficient schools....for providing primary educationfor providing secondary education and that in fulfilling their duties, a local education authority shall, in particular, have regard to the need for securing that special educational provision is made for pupils who have special educational needs ...".

7. In his judgment, Woolf LJ stated that "In order to arrive at the correct interpretation of section 8, it is important to recognise that the duty which it places upon the local education authority is in very broad and general terms..... This type of duty can be described as a 'target duty'. In the language of Mr Goudie there is built into section 8 a 'degree of elasticity'. While there are a number of standards which are required to be achieved by the local education authority, the setting of those standards is, in the first instance, for the local education authority alone to determine as long as those standards are not outside the tolerance provided by the section."

8. On the issue of damages sought by the applicant, Woolf LJ said that "the only remedy Mr Ali is now interested is the recovery of damages for the interference which took place in his son's education. However, having regard to what I said

² Fordham, 'Judicial Review Handbook', 4th Edition, page 754

earlier in the judgment, the duty imposed by section 8 is intended to ensure for the public in general and not intended to give the individual litigant a cause of action."

9. Following the judgment cited above, it would appear that any proposed amendment to the objects of ESF to the effect that the schools managed by ESF offer a modern liberal education without regard to disability may be interpreted as a target duty of ESF.

Resources for implementation of objects

10. Financial and budgetary constraints are relevant considerations in the determination of the range and level of services provided. In the case of *R v London Borough of Barnet ex parte B* [1994] ELR 357, Auld J held that "They relied upon the principle underlying the whole of the 1989 Act, and set out in s 1 of it, namely that when determining any question with respect to the upbringing of a child or his property, 'the child's welfare shall be the court's paramount consideration'. There is no merit in such an argument for two reasons. The first is a familiar one, namely that the council owed a general duty under s 17(1) of the Act to promote the welfare of the children in need in its area. Whether it fulfils that general duty, in particular by the provision under s 18 of appropriate day care for such children cannot be tested on a child-by-child basis. There will inevitably be instances where the overall provision is appropriate yet not ideal for certain individual children. The particular circumstances of any individual child must, therefore, be looked at in the context of the general 'range and level of services' provided. In such an exercise it is essentially a matter for the local authority, not the court, to decide what consideration and what weight should be given to the circumstances of any individual child or children when his or their needs or interests may conflict with the appropriate provision overall. Secondly, the weight which a local authority should give to the general circumstances of children in need for whom it must provide day care one way or another, when balancing them against its financial and budgetary constraints, must also be a matter for its judgment and experience. It is certainly a matter upon which the court would rarely be competent to intervene on the ground of irrationality."

Conclusion

11. The proposed objects of ESF in so far that they may be interpreted as target duty, unlike other statutory duty, provide a wide measure of tolerance with which ESF may operate. The court will not intervene in how they are to be implemented or achieved as long as ESF is not acting outside the tolerance. Financial and budgetary considerations, where relevant, are matters that the court will take into account if ESF is acting in any way under such objects as to be challenged on the ground of irrationality. However, it is not possible to say whether the

proposed amendment to the objects of ESF would by itself attract applications for judicial review that would otherwise not be made.

12. It may be possible that the proposed amendment to the objects of ESF, if passed, may have some practical implications on the ESF in formulating and implementing operational policies, including financial and resource implications.

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